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Ann Elizabeth Thomas v. Bert Charles Thomas : Reply Brief

Utah Court of Appeals

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Brent D. Young; Ivie & Young; attorneys for appellee.

Frederick N. Green; Green & Berry; attorney for appellant.

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IN THE UTAH STATE COURT OF APPEALS

970472-CA

ANN ELIZABETH THOMAS.

Appellant.

vs.

BERT CHARLES THOMAS,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal No. 970472-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH,
THE HONORABLE LYNN S. DAVIS PRESIDING

FREDERICK N. GREEN (1240)
GREEN & BERRY
Attorneys for Appellant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

BRENT D. YOUNG, ESQ.
IVIE & YOUNG
Attorneys for Appellee
48 North University Avenue
P.O. Box 657
Provo, Utah 84603

ORAL ARGUMENT REQUESTED

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Attorneys for Appellant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

BRENT D. YOUNG, ESQ.
IVIE & YOUNG
Attorneys for Appellee
48 North University Avenue
P.O. Box 657
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GREEN & BERRY
FREDERICK N. GREEN (1240)
Attorneys for Appellant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

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REPLY BRIEF OF APPELLANT

vs.

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BERT CHARLES THOMAS,

Appellee.

DETAIL OF ARGUMENT

I.

THE APPELLANT HAS MARSHALED THE EVIDENCE
WHERE NECESSARY.

This appeal does not rely principally on contested findings. In the limited instances where the Petitioner contests the Court's findings the evidence has been marshaled. Rather, the appeal refers to mistaken legal standards employed by the Court in connection with:

1. The custody of the parties' two children;
2. The failure to articulate facts to support an early termination of alimony;
3. The failure to conclude, as a matter of law, that the family home was a commingled asset;

4. The failure to conclude that the Respondent dissipated a marital asset in the form of cash on hand in the family construction company.

The Court found that, but for the "influence" of Pedro Sauer, ". . . it is **clearly** in the best interests of the children to be awarded to Ann Thomas." (emphasis added) (Findings of Fact ¶ 79) That finding is not disputed by either party. The only findings of fact disputed by the Petitioner relate to Mr. Sauer's character. Specifically, the Appellant objects to the finding by the Court that Mr. Sauer was a "convicted criminal" (Findings of Fact ¶ 77) and, apparently a spouse abuser (Findings of Fact ¶ 78). There is no evidence to support these findings. In fact, the Court concludes in its earlier Findings of Fact that the spouse abuse charge was simply an allegation, and that Mr. Sauer had only been charged with a possession of a firearm, and not convicted of that charge (Findings of Fact ¶ 73).

There are no findings which would explain the Court's early termination of alimony and therefore those findings are not contested. The Appellant specifically does not object to the findings regarding the amount of alimony.

The Appellant did, in its principal brief, contest the evidence to support the Court's finding that the marital home had a value of \$150,000 at the time of the marriage. However, the Respondent's observation that this objection was not preserved at trial by way of an objection, is well taken. Nevertheless, where sixty five percent (65%) of the home was constructed during the

marriage, the home is, as a matter of law, a commingled asset which has lost its identity as a separate asset.

Lastly, the Appellant claims that the Court should have found some value to Bert Thomas Construction Company, and its hard assets in particular. These assets included cash on hand. The Court should have attributed a value to Bert Thomas Construction Company which included the cash on hand at the time of separation where that cash was dissipated by the Respondent in order to pay his support obligations under the temporary order.

II.

THE COURT GAVE UNDUE WEIGHT TO THE CHARACTER OF A NON-COHABITANT, THIRD PARTY IN CHANGING CUSTODY TO THE RESPONDENT.

Mr. Thomas argues that this was a "close call" case. The Court's findings do not support that argument. The Court specifically found that it was clearly in the best interests of the children to be awarded to their mother for custodial purposes, except for the "influence" of Pedro Sauer. The issue is: under what circumstances should the character of a non-cohabitant third party be determinative of custodial issues?

The Court found that the relationship between Ms. Thomas and Mr. Sauer was "fairly discrete". (Findings of Fact ¶78). Additionally, the evaluators could make no "link" between the affair and its impact on the children. (Findings of Fact ¶ 78). What is notably missing from any testimony, evidence or Court finding is any suggestion that:

1. Ann Thomas' parenting ability was impaired; and,

2. That Mr. Sauer had somehow injured or harmed the children or that Ms. Thomas permitted such behavior.

In fact the Respondent's own expert, Dr. Jensen, was not able to observe any negative impact on the children by virtue of Mr. Sauer's presence. (Trial Transcript Volume 1, Page 64, Lines 2-17).¹

The Court did find that this is a complicated case with no easy, clear cut answers only because of the undue weight given the character or "influence" of Mr. Sauer². Mr. Sauer was not a cohabitant and there was no evidence that his limited exposure to the children had negatively influenced them.

Instead of findings that would demonstrate Ms. Thomas' impaired parenting ability, or how Mr. Sauer has impacted the best interests of the children, the Court includes pages of findings that relate only to Mr. Sauer's character. These findings, in addition to being irrelevant to the issue of custody, are troublesome for other reasons.

First of all, the findings are inconsistent and not supported by the evidence. Specifically, the Court notes that Mr. Sauer has been charged with criminal behavior and spouse

¹This fact, along with the Statements of Fact of the Petitioner in the principal brief and have not been disputed by the Respondent/Appellee.

²Specifically the Court found: "the appearance of **Señor** Pedro Sauer in an emotional and sexual relationship with Ann Thomas during the marriage is a very complicating factor". (Finding of Fact ¶ 71) (emphasis added)

abuse but then goes on to conclude that he is a convicted criminal, and that he is an abuser.

The Court notes that Mr. Sauer is not a citizen of the United States. Furthermore, he is Brazilian and that he is suave, debonair, irresponsible, and a womanizer and not ". . . a positive role model for little Joseph" (Findings of Fact ¶80). It is clear that the Court had some previous impression of Brazilian culture and particularly male members of that culture. This was the basis for the Court's own examination of Dr. Elizabeth Stewart at the time of her testimony (Trial Transcript, Volume 2, Page 43, Lines 10-14). The Court was "profoundly concerned" over Ms. Thomas' belief that Mr. Sauer is a positive role model. However, that concern is simply a restatement of the Court's impression of Mr. Sauer.

Mr. Thomas suggests that the above findings regarding Mr. Sauer "illuminate" deficiencies in Ms. Thomas' parenting ability and character. If this is true, the Court did not express that conclusion in its findings. Mr. Thomas suggests that the relationship shows that Ms. Thomas has an "inability to subordinate her own pleasures to the needs of her children". Likewise, this does not appear in the Court's findings.

The Court found that Mr. Thomas was a capable parent, and offered a more stable environment to the children. However, the evidence suggesting that Ms. Thomas could not offer an equally stable environment is, again, Mr. Sauer's character and "influence". The argument of Mr. Thomas is circuitous: "Mr.

Sauer is a bad influence. Ms. Thomas looks upon him as a positive role model. Therefore, Ms. Thomas is less stable because Pedro Sauer is a bad influence." Except for the findings regarding Pedro Sauer's influence, it is clearly in the best interest of the children that their principal custody continue with Ms. Thomas.

Given the lack of findings to support any conclusion that the relationship with Mr. Sauer either (1) impairs Ms. Thomas' parenting ability; or (2) is not in the best interest of the children, there are two conclusions that can be drawn. Either the Court overreacted to the finding of infidelity on the part of Ms. Thomas or the Court made a custody award based primarily on findings regarding Pedro Sauer's character and nationality, rather than the parenting ability of the children's mother. Either conclusion constitutes an abuse of discretion. (See Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989); Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984); Fontenot v. Fontenot, 714 P.2d 1131, 1132-33 Utah 1986); and Rule 4-903, (3)(E)(vii) Code of Judicial Administration).

III.

THE COURT FAILED TO ARTICULATE ANY FACTUAL BASIS FOR THE TERMINATION OF ALIMONY AFTER THIRTY-SIX (36) MONTHS BEGINNING WITH THE COMMENCEMENT OF THE TEMPORARY ORDER.

The Appellant does not contest the amount of alimony awarded. The Court has properly accounted for the three elements necessary to establish the amount of alimony. The Court successfully accomplished its calculation of alimony "in an

attempt to provide the minimum of necessities, comforts or luxuries essential to maintain customarily proper status or circumstances." (Finding of Fact ¶ 126). However, none of the findings that relate to the amount of alimony explain why alimony terminated after thirty-six (36) months (much less thirty-six (36) months after the commencement of the temporary order).

Mr. Thomas' conclusion that "apparently, the trial court felt . . ." highlights the problem. We are left to speculate what the Court felt or was thinking. In fact, there are no findings and there is no evidence which would suggest that circumstances of the parties were to change after thirty-six (36) months from the entry of the temporary order in such a way as to justify the termination of alimony.

Mr. Thomas goes on to speculate that Ms. Thomas had "some temporary expenses to set up her new life." However, there is no finding to support that suggestion and there is no citation to the record, either. Additionally, any "set-off" expenses would have already been incurred during the pendency of this lengthy case or could easily be paid from Ms. Thomas' separate assets which she was awarded.

Mr. Thomas also suggests that there was no showing that Ms. Thomas could not meet her financial needs without alimony. However, that is the very essence of the Court's finding regarding alimony; a finding which is not contested by the Respondent and not appealed by the Respondent.

This marriage was of longer duration than in Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991), and produced one more child than in the Thronson case. In the absence of any facts which would support a change of circumstances which could be anticipated at the time of the trial of this case, alimony should continue for a period of time allowed by the statute (equal to the duration of the marriage) or until unanticipated events occur which call for an earlier termination or modification³.

IV.

AS A MATTER OF LAW THE MARITAL HOME SHOULD
HAVE BEEN CATEGORIZED AS A MARITAL ASSET
RATHER THAN A HYBRID SEPARATE/MARITAL ASSET.

Assuming that the home had a value of \$150,000 at the time of the marriage, as a matter of law the Court should conclude that it lost its identity as separate property. Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988) provides for commingling or otherwise separate property as a result of the ". . . effort or expense contributed to the enhancement, maintenance, or protection of that property" by the other spouse. Mortensen v. Mortensen at 306 (citations omitted).

The facts of this case clearly distinguish it from other cases where the finding of a hybrid separate/marital asset has been upheld. In Schaumberg v. Schaumberg, 875 P.2d 598 (Utah

³At page 21 of the Respondent's brief he suggests that one explanation for the early termination of alimony is due to "the fault of the parties". The trial Judge noted the provisions of § 30-3-5(7)(b) but did not go on to make any findings whatsoever which would connect the fault of either party with the alimony award much less explain how fault would impact the duration of an alimony award.

App. 1994), the trial Court's finding of the hybrid marital/separate interest was sustained. However, in that case the nature of the property was significantly different than in this case. In Schaumberg the property in question was an office building owned by Mr. Schaumberg which had been improved during the marriage with money obtained by a loan and repaid from marital sources (Mr. Schaumberg's income). The improvement to the office building there did not approximate the improvements to the house in this case. In this case, the home was sixty five percent (65%) constructed during the marriage with the personal labor and assistance of Ms. Thomas. Additionally, the home was placed in the parties' joint names and mortgaged in consideration of the parties' joint promise to repay the loan.

The Court should be given leeway and discretion to determine matters such as this, as well as other matters raised on appeal in this case. However, there must be parameters and limits. These parameters and limits are set on a case by case basis in matters such as this. The Court should consider, particularly, the nature of this asset, and the fact that it was predominately constructed and paid for during the marriage (from marital sources). In addition, Ms. Thomas, by her effort, enhanced, maintained and protected the property. It should be concluded that the Court's earlier pronouncement in Mortensen v. Mortensen, supra and its subsequent cases were ignored by the Court. While there is no "bright line", this case is, as a matter of law, a case for marital property.

Mr. Thomas argues that there are extraordinary circumstances in this case exempting it from the requirements of Mortensen. The Court found no such extraordinary circumstances. Rather, the Court simply made its finding to support a hybrid characterization of the property.

v.

THE VALUE OF BERT THOMAS CONSTRUCTION COMPANY
SHOULD INCLUDE THE MONEY, ON HAND AT
SEPARATION, WHICH WAS USED BY HIM TO PAY HIS
TEMPORARY SUPPORT OBLIGATION.

It is inconsequential whether the savings account of Bert Thomas Construction Company is characterized as a marital savings account, or a hard asset of Bert Thomas Construction Company. In either case, the Court concluded that the balance on hand at the time of divorce would be controlling. This is inequitable.

Mr. Thomas acknowledged that he used that money during the pendency of the case to pay his support obligation pursuant to the Court's temporary order. (Trial Transcript, February 26, 1996, Page 122, Lines 8-19). The average balance in the Bert Thomas Construction Company account prior to separation was approximately \$39,000. This has been reduced to \$6,328 at the item of trial (Plaintiff's exhibits 7, 8, 9, 10, & 11 and Trial Transcript, Volume 2, Pages 99-104). The Court also found that Mr. Thomas had "inexplicability" reduced his income, sharply, during separation "regardless of the trend of residential construction in Utah County, and the previous Bert Thomas Construction trend." (Findings of Fact paragraph 104). The inescapable conclusion is that Mr. Thomas artificially reduced

his receipts and income, and lived off of the available cash on hand at the time of separation.

Mr. Thomas readily admits that he has used the cash to pay his temporary support obligation. He does not take issue with the claim in the Appellant's principal brief that the use of marital assets to pay a temporary support obligation constitutes dissipation of that marital asset. It was contemplated that Mr. Thomas would pay his temporary support obligation out of his earnings. The burden was on Mr. Thomas to explain why his earning reduced, in spite of his income trend, and the trend in the industry. He failed to do so.(Findings of Fact ¶ 104).

VI.

THE COURT DID NOT ERR WHEN IT INCLUDED
COMPANY NET PROFITS IN THE RESPONDENT'S
INCOME

The Respondent appeals the Court's finding that Mr. Thomas earned, on average, \$69,567 per year for the years immediately preceding the separation. Furthermore, the Court concluded that income reflected Mr. Thomas' minimum earning capacity based upon:

1. His income history;
2. The local trend for residential construction in Utah County; and,
3. The trend in Bert Thomas Construction Company revenues.

First of all, the Respondent objects to the Court's inclusion of company net income and the total income figure. Secondly, Mr. Thomas, apparently, disputes the Court's finding of fact number 104 which states:

"Inexplicably and contrary to the Respondent's own testimony, the actual Bert Thomas Construction Company revenue has declined sharply since separation regardless of the trend of residential construction in Utah County and the previous Bert Thomas Construction trend, see Exhibit 13."
(Finding of Fact ¶ 104).

Instead of the methodology utilized by Derk Rasmussen, CPA, the expert for the Petitioner, the Respondent relies solely upon his tax returns to establish his income.

Mr. Thomas agrees with the methodology utilized by the Court (with the exception of including company net profits) which adopted the methodology of Derk Rasmussen, CPA. In determining the Respondent's income the Court employed the formula set out in §78-45-7.5, Utah Code Ann. (1953 as amended) which provides as follows:

§ 78-45-7.5 Determination of Gross Income - Imputed Income

(4)(a) gross income from self employment or operation of a business shall be calculated from subtracting necessary expenses required for self employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) gross income determined under this subsection may differ from the amount of business income determined for tax purposes.
(Emphasis added)

As will appear hereafter, the Respondent's appeal of the Court's finding must fail because, among other reasons, he has

failed to marshal the evidence in support of the Court's finding (see Point I, page 9, Brief of Appellee).

At the heart of the Respondent's argument is the allegation that he "did not receive any benefit from that money", referring to the corporate net profit, because it was kept in the corporation. This reasoning is in error because:

1. As the owner of the company Mr. Thomas could withdraw these funds at anytime and did so.

2. These funds were kept in the construction company savings account and actually withdrawn by Mr. Thomas during the pendency of this case.

3. Ironically, these are the same funds which were dissipated by the Respondent during the pendency of this case (see Point V of this brief and the Appellant's principal brief).

4. The Respondent's argument leaves the impression that the Court added back the cash reserve balance year after year to determine the Respondent's income. This is not the case. The Court simply included corporate net profits, not the entire reserve account balance. The cash reserve account reflected some retained earnings or profits. In any given year, some of the net profits may have been disbursed to Mr. Thomas and the remainder kept as a reserve account or retained earnings. Likewise, in any given year (such as after separation) the Respondent could and did draw upon the reserve account representing accumulated net profit.

5. Once the corporation had a reasonable cash reserve there was no reason not to disburse net profit from subsequent years. As of 1989 the corporation had nearly \$30,000 in the bank. (See Exhibit 9, tab E to the Addendum to Brief of Appellant). There was no need to maintain any additional cash reserve or at least the Respondent did not testify to any additional cash reserve need. Therefore, all net profit after 1989 could have been and often was used by the Respondent. (In fact, after the year of the parties' separation the company reserve account went steadily downward until it reached an all time low for the period of the accounting of under \$8,000 at about the time of the trial).

While Derk Rasmussen, CPA did testify that the corporation retained some of its net income he never testified that Mr. Thomas "did not receive any benefit from that money" (Respondent's Brief at page 11). Additionally, he testified that he did not believe that it was good tax planning for the corporation to retain net income. (Trial Transcript, Volume 2, Page 132, Lines 10-13).

The Court and Mr. Rasmussen both determined that there was nothing illegal in how the books of the construction company and the leasing company were kept. The goal was to determine the cash available to the Respondent within the provisions of §78-45-7.5, Utah Code Ann. (1953 as amended) which is different than the IRS test for taxable income. It is the IRS test for taxable income that the Respondent asserts as the appropriate measure of his income for child support and alimony purposes.

Mr. Thomas testified that the trend for gross revenues of the company was steadily increasing up until separation. Additionally, Mr. Thomas and Derk Rasmussen, CPA testified that the trend in the area for residential construction was steadily increasing. (Finding of Fact, paragraph 104 and Petitioner's Exhibit 13). In determining that the Respondent's sharp decrease in income during the pendency of the case was "inexplicable", the Court rejected the Respondent's testimony that his income was affected by his new found paternal responsibilities or the fact that Ms. Thomas no longer helped in the business⁴. Obviously, the Court had inadequate factual basis upon which to make its finding.

CONCLUSION

The Court concluded and found that it was clearly in the best interests of the children for Ms. Thomas to be awarded custody except for one factor. The Court, therefore, found contrary to the clear weight of all of the evidence and awarded custody to Mr. Thomas because of the "influence" of "Señor" Pedro Sauer. The findings regarding Mr. Sauer's "influence" and character are based upon faulty and inconsistent findings regarding criminal charges and charges of spouse abuse which were not supported by any conviction or finding in any other proceeding or by the evidence in this case. More important, the

⁴Ms. Thomas' involvement in the business is one of the reasons she lays claim to the cash reserve account which existed at the time of separation and was dissipated during the pendency of the case. (See Point V herein).

Court's disapproval of Mr. Sauer included findings regarding his nationality and the Court's personal experience with Brazilian culture and its impact upon male members upon that society. There was no evidence to link Mr. Sauer's influence with Ms. Thomas' parenting ability or the best interests of the children. The Court gave undue weight to its findings regarding Mr. Sauer's character and influence.

The Court did not explain why alimony should terminate after three years commencing with the temporary order in the case. Absent some findings to support an early termination of alimony, it should have continued until modified in subsequent proceedings or limited by the Utah statute.


The home of the parties should have been categorized as a marital asset. This conclusion should have been made because of the nature of the asset, the fact that it was substantially constructed during the marriage, because it was owned jointly by the parties, and mortgaged and paid for during the marriage with marital funds.

The family corporation included almost \$40,000 in cash at the time of separation. These funds were dissipated by the Respondent in part to pay his obligation to the temporary order. In addition, the Respondent lived off of those funds when his income "inexplicably" and sharply dropped during the pendency of this action. These funds should have been included in the value of the company and equitably divided between the parties.

The Court did not err in determining that Mr. Thomas earns \$69,557 dollar per year or has the capacity to do so based upon his history and ability. The Court did not err in including company net profits in the cash available to the Respondent for purposes of determining child support and alimony under the applicable statute. Mr. Thomas could withdraw and benefit from those funds and, in fact, did so before and after separation.


DATED THIS 12 day of November, 1998.

GREEN & BERRY


FREDERICK N. GREEN
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Frederick N. Green, certify that on the 12 day of November, 1998, I served a copy of the attached Appellant's Reply Brief upon Brent D. Young, Esq. the counsel for Appellee in this matter by mailing a copy by first class mail with sufficient postage prepaid to the following address: 48 North University Avenue, P.O. Box 657, Provo, Utah 84603.


FREDERICK N. GREEN
Attorney for Appellant